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IN THE

Supreme Court of the United States

OCTOBER TERM, 19.....

No. 971

ARTHUR F. DUMAINE,
Petitioner

versus

THE STATE OF LOUISIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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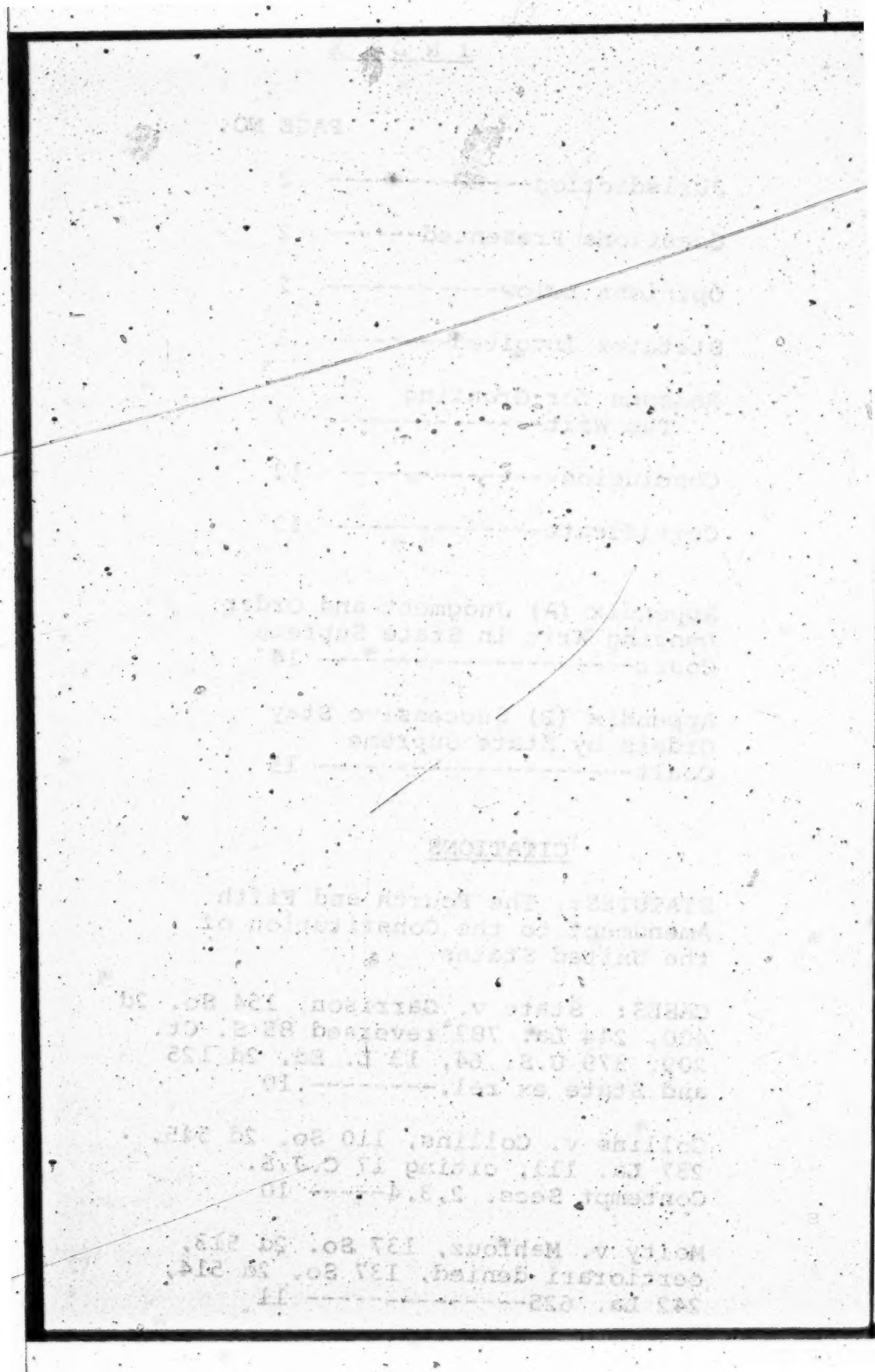

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

NO.

ARTHUR F. DUMAINE,
Petitioner

versus

THE STATE OF LOUISIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Arthur F. Dumaine, petitioner, prays that a writ of certiorari issue to the Supreme Court of the State of Louisiana to review the judgment and order of said Court in denying a writ of certiorari in proceedings bearing the docket No. 48950 of said court, said order or judgment having been entered on November 2, 1967. Said petition to the State Supreme Court involved a demand for the issuance of certiorari to review the judgment of Honorable Frank Shea, Judge of Section "G", Criminal District Court, Parish of Orleans, in sentencing petitioner, a New Orleans attorney, to imprisonment for contempt of court in allegedly

failing to appear for trial in a criminal case in said Court on October 25, 1967.

OPINION BELOW

The only written opinion below was that in connection with the order or judgment of the Supreme Court of Louisiana, proceeding No. 48950, entered November 2, 1967 copy of which appears herein in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Rule 19 of the United States Supreme Court.

The judgment or order of the Supreme Court of Louisiana denying certiorari to the State District Court was entered on Nov. 2, 1967 and successive stay orders were issued by said State Supreme Court whereby its mandate was suspended until Dec. 27, 1967.

QUESTIONS PRESENTED

1. Does the Louisiana judicial system provide adequate appellate review of a sentence for constructive contempt of Court, committed out of the presence of the Court?

2. Was petitioner denied due process and equal protection of the laws under the Constitution of the United States?

STATUTES INVOLVED

The "due process clause" and the "equal protection of the laws" clauses of the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner is a licensed attorney, practicing in State and Federal Courts in New Orleans, Louisiana. On October 25, 1967 Petitioner was the attorney of record for an indigent defendant in Section "G" of the Criminal District Court Parish of Orleans, State of Louisiana, said case being entitled State of Louisiana vs. Robert Broussard, No. 200,645. The accused in said case was charged with "attempted burglary" and petitioner had been appointed by the Court, Honorable Frank Shea, to represent said defendant who was a pauper.

Broussard had already been convicted in another Section of the same court in a jury

trial before Judge Bernard Bagert and Petitioner had represented the defendant at that trial. Petitioner had accepted an appointment by Judge Shea, Section "G", and said case was set for trial on October 25, 1967.

On said trial date, October 25, 1967, petitioner failed to appear in Judge Shea's court for the scheduled trial of Broussard for several reasons:

(a) Early on the morning of said date, October 25, 1967, petitioner had rushed his seven and one-half month pregnant wife to the emergency room of Merch Hospital in New Orleans. His wife became unconscious at the time of arrival at the hospital and appeared in critical condition. Petitioner's first son had died several weeks after birth and petitioner was emotionally upset because of his wife's condition. He had not slept at all the entire morning from midnight until 9:00 A.M. when he left his wife. When he arrived at his office at approximately 10:00 A.M. that morning he found another client, a Mr. Santiny,

waiting for him to go to Federal Court where Santiny was scheduled to go to trial.

At approximately 10:05 A.M. on said date, October 25, 1967, petitioner received a telephone call from Mr. Max Gonzalez, the minute clerk of Judge Shea, who informed the petitioner that he should report immediately in Judge Shea's Court, Section "G" for the above described trial of Broussard. Petitioner explained to the minute clerk all the circumstances, namely, the emergency situation at the hospital affecting the life and safety of his wife and expected child and the scheduled trial in Federal Court. Nevertheless, on instructions of said trial Judge, petitioner was informed that he would be held in contempt of court if he did not appear for the Broussard trial that morning. Petitioner was then informed(also on orders of the said State Judge) that if he failed to appear, two deputies would be sent to arrest him.

At approximately 11:50 A.M. petitioner was arrested in the Federal District Court by two members of the Orleans Parish Sheriff's office

who then conveyed him to Section "G" of the Criminal District Court before Judge Shea.

When called before Judge Shea, petitioner explained all of the above circumstances to him and called to his attention the fact that, because he was extremely upset emotionally and due to the excitement and lack of sleep, he was unable to do justice to the defendant Broussard in the trial of said case. Nevertheless, the said trial Judge refused to accept any of the said excuses and sentenced petitioner to imprisonment of four hours for contempt of court.

Thereupon, Petitioner filed notice of his intention to apply for a writ of certiorari to the Supreme Court of Louisiana and a stay order was issued by Judge Shea. Thereafter, when a writ of certiorari was denied by the State Supreme Court on November 2, 1967, another order was issued by said Court further staying the order for imprisonment of petitioner until disposal of the present application of certiorari in this court.

REASONS FOR GRANTING THE WRIT

Throughout the nation, the increased tension between the State and Federal judicial systems is a matter of which this Court may well take judicial notice. Particularly is this so in the so called "deep South" where new concepts of civil liberties and due process have been "forced fed" throughout the past ten or fifteen years. A by-product of this super-imposed due process by ultimate authority has obviously produced among certain elements of the State judiciary a noticeable "inferiority complex" which is evidenced by flare-ups and unwarranted actions of various kinds.

In the instant case the net result of this application for certioriari, will not of itself attract national attention. There will be no band of marching protestors to picket this or any court to save petitioner from serving an imprisonment of four hours; but, the principle involved here is nevertheless a most serious one. It would be difficult indeed to conceive of a more grevious abuse of power than

was demonstrated by the District Judge in this case where we have a young Louisiana Attorney being hauled away physically by two State deputy sheriffs while appearing in connection with a case in Federal Court. Not only that, but this action was taken with full knowledge on the part of the District Judge that this young attorney had just come through a nerve racking deal involving the possible death of his pregnant wife. Petitioner was in no condition physically or mentally to try this serious case involving the crime of attempted burglary. To force him to even attempt to defend against this serious charge or to show up in court under these circumstances was an abuse of power.

Moreover, although a competent attorney, petitioner on that date and time was not competent to represent Broussard because of his physical exhaustion and shock. The Judge well knew these facts. The slight sentence imposed here may not seem of such magnitude as to invoke the supervisory jurisdiction of this Court, but the principle involved does demand such

intervention. More and more there will be repeated instances of judicial back lashes at both District and Appellate levels in State courts unless this sort of thing is nipped in the bud. We submit that the time to do it is now and the case in which to do it is this one.

NO RIGHT TO REVIEW UNDER LOUISIANA SYSTEM

When petitioner sought certiorari in the State Supreme Court the trial Judge filed a written return thereto and in said return he stated further his reasons for sentencing petitioner for contempt. Without attempting to controvert the various factual statements contained in said return, petitioner calls to the attention of this Court that, even taken at face value, the facts stated by the trial Judge could not constitute more than a "constructive" or "Indirect" contempt. There is no suggestion whatever that petitioner was insolent or abusive or that he did anything in the presence of the judge which could, by any stretch of the imagination be classed as "direct" contempt. The

distinction between "direct" contempt and "Indirect" or "constructive" contempt has been recognized in many cases and it is not necessary to represent any extensive collection of cases on this point. We may cite only the following: State v. Garrison, 154 So. 2d 400, 244 La. 787 reversed 85 S. Ct. 209, 379 U.S. 64, 13 L. Ed. 2d 125 and State ex rel. Collins v. Collins, 110 So. 2d 545, 237 La. 111, citing 17 C.J.S. Contempt Secs. 2, 3, 4. In the Collins case, supra, the distinction between the type of contempt is well illustrated in the sylabus as follows: "Contempts of court are divided into "direct" and "indirect" or "constructive"; the former is committed in the presence of the court and consists of words spoken or acts committed while the court is in session, or during its intermission, which tend to embarrass or prevent justice, and an "indirect" or "constructive contempt" is an act committed out of the presence of the Court, which tends to degrade the court or obstruct or thwart the administration of justice".

Here, however, although there was involved at most a "constructive" or "indirect contempt and although there was no formal charge ever filed, the Louisiana system provides no appeal as a matter of right. All that a party can hope for under such circumstances is a discretionery review, under certiorari, by the appellate court. This is well settled under Louisiana law. See: MOITY v. MAHFOUZ, 137 So. 2d 513, certiorari denied, 137 So. 2d 514, 242 La. 625; PEARCE v. DOZIER, 181 So. 2d 432.

The net result here was that, after petitioner was sentenced for a constructive contempt by the trial Judge, without any formal hearing whatever, the Supreme Court of Louisiana was called upon to exercise its discretion to review solely on the face of the sworn petition of the application and the written return of the Judge. As will be noted in said return, the Trial Judge based his action, at least in part, upon wholly unrelated incidents in which he had become displeased with the conduct of petitioner. Thus, if this conviction is allowed to stand

intemperate and irascible Judges may be allowed to settle long standing irritations and supposed grievances against members of the bar by simply seizing upon some current irregularity, calling it contempt of Court and putting them in jail. Under a system which permits no review of right and no written record of the testimony or exchanges in open Court, this cannot be deemed due process of law or equal protection of the laws. The light sentence imposed here should not dissuade this Court from intervening to discourage what may well become a vicious practice in the growing turbulence being generated as a by-product of the conflict between State and Federal systems.

Wherefore, the premises considered, petitioner prays that a writ of certiorari issue herein, directed to the Supreme Court of Louisiana and that, after due proceedings had, that a writ issue to said Court, setting aside the judgment or order of said Court and the judgment of the District Court. Petitioner

further prays that a stay order issue herein pending the disposition of this application.

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New Orleans, La.

George M. Leppert
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New Orleans, La.

Attorneys for Petitioner

PROOF OF SERVICE

I, Guy Johnson, attorney for petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Attorney General of Louisiana and the District Attorney for the Parish of Orleans.

New Orleans, La., December , 1967.

APPENDIX A

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

No. 48,950 November 2, 1967

In re: Arthur F. Dumaine

- - - - - - - - -

In re: Arthur F. Dumaine applying for writs of certiorari, mandamus and prohibition.

- - - - - - - - -

Writ refused. The return of the trial judge considered, we find no abuse of discretion in this matter.

/s/ FWS

/s/ EHMcC "

/s/ JBH

/s/ JWS

/s/ FWH

/s/ WBH

- - - - - - - - -

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
November 2, 1967

s/ Harold A. Moise, Jr.
Deputy Clerk

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 48,950

IN RE: ARTHUR F. DUMAINE

STAY ORDER

On application of Arthur F. Dumaine, and on suggesting that this Honorable Court, has refused application for writs of certiorari, mandamus, and prohibition in the above numbered and entitled matter on November 2, 1967; and that the said Arthur F. Dumaine intends to apply to the Supreme Court of the United States of America; in the above numbered and entitled cause, and that his sentence should be stayed.

s/ Arthur F. Dumaine

O R D E R

IT IS ORDERED, that the execution of the sentence of Arthur F. Dumaine, in case number 48,950 should be stayed until 20th day of November 1967.

s/ Frank W. Summers
Associate Justice

November 3rd, 1967
New Orleans, La.

A TRUE COPY
Clerk's Office
New Orleans,
Nov 3, 1967
s/ Harold A. Moise, Jr
Dy. Clerk Supreme
Court of Louisiana

SUPREME COURT OF LOUISIANA

NUMBER: 48-950

In Re: Arthur F. Dumaine

STAY ORDER

On application of Arthur F. Dumaine, and on suggesting to this Honorable Court that he has filed notice with this Honorable Court that he intended to apply to the United States Supreme Court for writs, and further suggesting that his contempt sentence has been stayed by this Honorable Court.

Mover respectfully informs this Honorable Court that he does not represent himself in the United States Supreme Court, and that his counsel has been unable to assist mover in the preparation of writs to the United States Supreme Court, because mover's counsel has not been in the State of Louisiana.

Mover has presently prepared a draft of his writs to the United States Supreme Court, and requests that this Honorable Court give him additional time and order his sentence stayed.

s/ Arthur F. Dumaine

O R D E R

IT IS ORDERED, that the execution of the sentence of Arthur F. Dumaine, in case number 48,950 should be stayed until the 27th day of December 1967.

s/ Joe W. Sanders
Associate Justice

November 27, 1967

New Orleans, La.

A TRUE COPY

Clerk's Office, New Orleans, December 19th, 1967.

s/ Hugh St. Paul
Dy. Clerk Supreme Court of Louisiana

LIBRARY
SUPREME COURT, U. S.

JAN 27 1968

JOHN F. DAVIS, CLERK

Supreme Court of The United States

October Term, 1967

No. 971

ARTHUR F. DUMAINE

versus

STATE OF LOUISIANA

Opposition of State of Louisiana to
Petition for a Writ of Certiorari
To Supreme Court of Louisiana

JACK P. F. GREMILLION
Attorney General

WILLIAM P. SCHULER
Assistant Attorney General

JIM GARRISON
District Attorney

LOUISE KORNS
Assistant District Attorney

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 971

ARTHUR F. DUMAINE

versus

STATE OF LOUISIANA

OPPOSITION OF STATE OF LOUISIANA TO PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF LOUISIANA

STATEMENT OF THE CASE

Some time during 1967 the Honorable Frank J. Shea, Judge of Section G of the Criminal District Court for the Parish of Orleans, appointed Attorney Arthur Dumaine, petitioner herein, to represent Robert Broussard, who was charged by the State of Louisiana with attempted burglary in *State of Louisiana vs. Robert Broussard,* no. 200,645 on the docket of the Criminal District Court for the Parish of Orleans. Mr. Dumaine accepted the appointment and became attorney of record in the case.

On October 9, 1967, approximately two weeks before the date for trial, Mr. Dumaine was personally served

with an Attorney's Notice of Trial by the Criminal Sheriff's Office, which Notice of Trial informed petitioner that *State v. Broussard* had been fixed for trial on October 25, 1967 at ten in the morning. See Attorney's Notice of Trial.

October 25 was a jury day. At ten o'clock when *State v. Broussard* was called for trial Mr. Dumaine was not present, although he had not informed the court that he would be either late or absent on that date. Judge Shea held the jury in the courtroom and sent sheriffs throughout the Criminal Courts Building in an attempt to find Mr. Dumaine. They were unable to do so.

At approximately 10:15 Judge Shea instructed his Minute Clerk, Max Gonzales, to call Mr. Dumaine's office to discover his whereabouts. As it happened, Mr. Dumaine was at that very moment in his office and spoke to Mr. Gonzales, who told petitioner that his presence was required in Judge Shea's court at that time.

Mr. Dumaine thereupon told the Minute Clerk that he had to be in federal court that morning, and that he could not come to Judge Shea's court.

Judge Shea then instructed Gonzales to tell Mr. Dumaine to come to his court immediately, which Mr. Dumaine refused to do, stating that he had to go to federal court. Judge Shea informed Mr. Dumaine through Gonzales that unless petitioner came to his court immediately he would send two sheriffs to bring him to court. Mr. Dumaine at this point informed Judge

Shea for the first time that his wife was ill. After a few more interchanges between Judge Shea and Mr. Dumaine, petitioner ended the telephone conversation by saying that he had to go to federal court, and that Judge Shea could send as many sheriffs as he wanted to for him but that he was not going to come to Judge Shea's court, whereupon petitioner hung up the phone and thus abruptly ended the conversation.

Shortly thereafter, Judge Shea sent two sheriffs to Mr. Dumaine's office to bring petitioner to his court. After the sheriffs left, Judge Shea received a phone call from an associate of Mr. Dumaine, who told Judge Shea that petitioner had left the office and gone to federal court. Judge Shea left instructions to have the sheriffs told where Mr. Dumaine could be found. A short time later petitioner was found by the sheriffs in federal court and taken to Judge Shea's court.

When Mr. Dumaine was brought into Judge Shea's court by the sheriffs that same morning, Judge Shea asked petitioner why he had not been present for the trial of *State v. Broussard* at ten o'clock. Petitioner replied that his wife was sick. Judge Shea next asked petitioner why he had first told Gonzales that the necessity of his being in federal court was his reason for not coming to Judge Shea's court. Petitioner did not answer this question. Judge Shea then asked petitioner why he had refused to come to his court when he spoke to Gonzales on the phone from his office. Petitioner answered that he had to go to federal court or he would have been held in contempt by that court.

Judge Shea found Mr. Dumaine guilty of contempt and sentenced petitioner to four hours in the Parish Prison, deferring the execution of sentence until such time as his wife was better.

On October 27, 1967 Mr. Dumaine applied to the Supreme Court of Louisiana for Writs of Certiorari, Mandamus and Prohibition, obtaining a stay of sentence. On November 2, 1967 the Louisiana Supreme Court refused writs on the ground that it found no abuse of discretion after considering the Return of the Trial Judge.

On December 29, 1967 Mr. Dumaine filed a Petition For a Writ of Certiorari in this Honorable Court. Execution of sentence herein has been stayed pending a final decision in the matter by this Court.

For verification of facts set out above, see Return of Trial Judge and Attorney's Notice of Trial.

ARGUMENT

Under Louisiana law the instant case involves a direct contempt of court, as it was one committed by a contumacious failure to comply with a summons or order to appear in court, proof of service of which appears on record. See Art. 21 La. Code Crim. Proc. A person who has committed a direct contempt of court may be found guilty and punished therefor by the court without any trial, after he has been afforded an opportunity to be heard orally by way of defense or mitigation. Art. 22 La. Code Crim. Proc. When an at-

torney is adjudged guilty of a direct contempt of court, the punishment for the first offense is limited to a fine of not more than one hundred dollars, or imprisonment for not more than twenty-four hours, or both. Art. 25 La. Code Crim. Proc. Similar statutes exist in other jurisdictions. Without power to enforce discipline, courts would quickly fall into chaos.

In the present proceeding it is important to note that Mr. Dumaine had been personally served with notice of Broussard's trial — at ten in the morning on October 25, 1967 — approximately two weeks in advance of the date of trial; that Mr. Dumaine was not scheduled to appear before Judge Boyle in the Federal District Court on that same date until eleven in the morning; that petitioner had known *for nine days* that he had to be in Judge Shea's court for a trial at ten a.m. on October 25 and in Judge Boyle's court for a rearraignment at eleven a.m. that same day (petitioner received the state court notice of trial on October 9 and the federal court notice of rearraignment on October 16), and thus had ample time to file a Motion for Continuance in one of the two cases if he was of the belief that he could not handle both of them on the same day, or perhaps arrange to have an associate take his place at the rearraignment; and that neither Mrs. Dumaine's illness nor petitioner's eleven o'clock appointment in federal court can be urged as an excuse for petitioner's contemptuous refusal to appear in Judge Shea's court at ten o'clock on the morning of Broussard's trial because at this very time Mr. Dumaine was in his office with a client transacting business.

It is further submitted that the sentence of four hours in Mr. Dumaine's case reflects the mitigating circumstances of Mrs. Dumaine's illness and bears a reasonable relation to the nature and gravity of the contumacious conduct. See *United States v. Conole*, 365 F.2d 306 (3d Cir. 1966).

The right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government. Courts necessarily possess the means for punishing for contempt when any conduct tends directly to prevent the orderly discharge of judicial functions. See *Wood v. Georgia*, 370 U.S. 375. Incident to the enforcement of this responsibility, courts have disciplinary powers over members of the bar. *Cohen v. Hurley*, 366 U.S. 117. Lawyers are officers of the court and the courts have a duty to supervise their conduct; courts are required to exercise this duty to preserve judicial decorum and to enforce the respectability of the legal profession. *Ex parte Burr*, 22 U.S. 529. Furthermore, lawyers have a duty, not only to their clients, but to the courts, to attend court sessions punctually, and they must not allow their private interests to conflict with those of their clients. *United States v. Anonymous*, 215 F.Supp. 111 (E.D. Tenn. 1963).

The State of Louisiana respectfully submits to this Honorable Court that Mr. Dumaine's reckless disregard of his duty to Judge Shea's court and to his client demonstrates his contempt. An unnecessary burden was thereby placed on the Louisiana treasury, the administration of justice was slowed down, and great inconvenience was caused to the court, jurors, wit-

nesses, prosecuting attorneys, etc., who were in their appointed places at the proper time. See *United States v. Anonymous,* supra.

The State of Louisiana realizes that Mr. Dumaine was upset on the date of Broussard's trial because of Mrs. Dumaines' illness during the preceding night and that petitioner had possibly conflicting appointments on that date in State and federal court. However, as has been pointed out above, petitioner was in his law office attending to his personal business at the time he should have been in Judge Shea's court, and, furthermore, he had had approximately nine days to resolve any conflict which might exist between his state and federal court appearances and had taken no steps whatsoever to handle this conflict in an intelligent, considerate fashion, or to even inform Judge Shea that such a conflict existed.

CONCLUSION

The State of Louisiana is of the respectful opinion that Judge Shea's action in finding Mr. Dumaine to be in contempt of his court and sentencing him to four hours in prison was fully justified by Mr. Dumaine's arbitrary refusal to conduct himself as a responsible attorney should, and that consequently the Application for Writ of Certiorari which has been filed herein should be denied.

Respectfully submitted,

JACK P. F. GREMILLION,
ATTORNEY GENERAL

WILLIAM P. SCHULER,
ASSISTANT ATTORNEY
GENERAL

JIM GARRISON,
DISTRICT ATTORNEY

LOUISE KORNS,
ASSISTANT DISTRICT
ATTORNEY

CERTIFICATE

I certify that a copy of this brief has been mailed to

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